Union Calendar No. 170

100TH CONGRESS *1st Session*	HOUSE OF REPRESENTATIVES	REPORT 100-273

IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT

A FIVE-YEAR REPORT

A REPORT

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

AUGUST 4, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC, August 4, 1987.

Hon. JIM WRIGHT,
The Speaker,
U.S. House of Representatives,
The Capitol, Washington, DC.

DEAR MR. SPEAKER: Transmitted herewith is a report of the Committee on Small Business entitled, "Implementation of the Regulatory Flexibility Act—A Five-Year Report."

The report is transmitted with the approval of the Full Committee.

With best wishes, I am,
Sincerely,

JOHN J. LAFALCE, *Chairman.*

Enclosure.

LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES, COMMITTEE ON SMALL BUSINESS, SUBCOMMITTEE ON EXPORTS, TOURISM, AND SPECIAL PROBLEMS,

Washington, DC, July 29, 1987.

Hon. JOHN J. LAFALCE,
Chairman, Committee on Small Business, Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN LAFALCE: Enclosed is a report by the Subcommittee on Exports, Tourism, and Special Problems entitled: "Implementation of the Regulatory Flexibility Act—A Five-Year Report."

I am pleased to transmit this report to you as Chairman of the Committee on Small Business with the approval of a majority of the Subcommittee members.

With respect, I am

Yours truly,

IKE SKELTON, *Chairman.*

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Mr. LAFALCE, from the Committee on Small Business, submitted the following

REPORT

I. INTRODUCTION

"Because we smaller (businesses) don't have a large (or indeed any) staff in Washington, it is impossible for us to participate—and make small business impacts known on the record—in every phase of every hearing on every docket before the (agency). I believe it is incumbent on the agency to comply with the Regulatory Flexibility Act by considering and reporting the expected impact on small businesses in each of its decisions. I would ask that you require this accountability."—Small business owner on the importance of oversight [1]

"Your passage of the Regulatory Flexibility Act created a paper tiger in all those instances in which agencies refuse to comply with the letter and spirit of the Regulatory Flexibility Act. (Agencies) have routinely circumvented * * * and frustrated the intent of the Regulatory Flexibility Act by its certification. If that is what you intended, then just vote to sunset the whole Act and stop the charade."—Businessman expressing his frustration with the RFA.[2]

"We would also be less than candid if we did not recognize that Congress theoretically rendered sections 603 and 604 of the Regula-

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[1] Testimony submitted by Dennis D. Dundon, president A.C. Inter-Connect; Implementation of the RFA Hearings, before the Subcom. on Exports and Special Problems, Comm. on Small Business, 99th Congress, 2d Session, April 16 and May 22, 1986, pp. 218–219.

[2] Testimony of Carl Pescosolido, co-owner of Sequoin Orange Co. Inc., Implementation of RFA Hearings, pp. 86–92.

tory Flexibility Act nullities based on sections 605 and 611. However, it is for Congress to correct this anomaly if it so desires."—United States District Court.[3]

II. Executive Summary and Findings

On September 19, 1980, the Regulatory Flexibility Act, which modified the Administrative Procedures Act, was signed into law. Its passage was the result of three years of hard work by the House Small Business Committee and other Committees in Congress, but more importantly, it culminated a decade of effort by thousands of concerned businessmen and women from every State involved in every kind of business. They rebelled against a volcano of seemingly senseless, ill-conceived regulations that threatened to bury everyone but was particularly harsh for small businesses. The tool they forged was a new chapter to the Administrative Procedures Act requiring bureaucrats to think about the effects of their actions, consider simple alternatives and include the interested public in on the process. The act has now been in effect for five years and has received enough dispositive judicial and executive interpretation to warrant our review.

The Subcommittee on Exports and Special Problems of the Small Business Committee conducted hearings, reviewed the reports of the Small Business Administration Office of Advocacy and read court decisions that have interpreted the Regulatory Flexibility Act over the last five years. The subcommittee questioned agencies who have successfully implemented the Regulatory Flexibility Act and agencies who are struggling with its implementation. The purpose of this report is to present to Congress what the subcommittee found to be the current situation with the Regulatory Flexibility Act. In addition, this report will lay out the facts that support the findings in "problem areas" and make policy recommendations which Congress should consider for future action.

The subcommittee found that most Federal agencies, required by law to comply with the Regulatory Flexibility Act, are making an effort to do so. Agencies who have made a conscious policy to find the best way to comply with the Regulatory Flexibility Act have compiled their agendas and established procedures to institutionalize the process of analyzing proposed regulations for their impact on small business. They have communicated the alternatives to the appropriate businesses, responded to their comments in a thoughtful way and fashioned solid regulations in even the most technically demanding cases concerning the most passionately charged issues. As an added benefit, those agencies which have established such systems informed the subcommittee that it saves them time, money, and litigation headaches because they are able to promulgate well-founded regulations.

However, the subcommittee also found that agencies who do not wish to comply with the letter or the spirit of the Regulatory Flexibility Act have fallen back on the argument that compliance is too expensive and too time consuming. These agencies have interpreted

[3] See *Lehigh Valley Farmers, et al* versus *John R. Block*, Secretary of Agriculture, 640 F. Supp. 1497 (1986).

key portions of the law in such a way that the objectives of the law have been thwarted and its requirements circumvented. In answer to their arguments, the subcommittee found that the Regulatory Flexibility Act provides the essential elements that are necessary to make compliance with the Regulatory Flexibility Act less costly and less time-consuming. The noncomplying agencies need only make the effort to find a procedure that will work with their existing regulatory system. The subcommittee points out that other agencies have exercised their discretion to find unique and creative methods of rulemaking which meet the goals of the act while carrying out the duties of those agencies. The Chief Counsel for Advocacy of the Small Business Administration is also available to consult with any agency that needs help. The Advocate has the resources and experience to help set up an acceptable procedure within the agency and then assist in involving the appropriate members of the regulated communities.

The subcommittee finds that the Chief Counsel for Advocacy of the Small Business Administration is doing a good job fulfilling his mandate (which is to monitor compliance with the Regulatory Flexibility Act) when the budget and the manpower of his office are considered. The subcommittee recommended that he be more aggressive in his comments where an agency has not seen fit to even certify, or has completely and consciously disregarded the act and also in entering judicial proceedings as an amicus curiae pursuant to the Regulatory Flexibility Act. The subcommittee views this function as one of the most significant tools of the act and takes note of the fact that the Advocate has only entered two cases in five years. The subcommittee recognizes, however, that the Chief Counsel for Advocacy serves at the pleasure of the President and must therefore be sensitive to working inside the system. The subcommittee also knows that the Advocate cannot invalidate regulations nor compel judicial review. Also, he must review thousands of regulations with a relatively small staff. Under these circumstances, the Advocate's efforts to pick his best opportunity for maximum benefits to small businesses and for maximum visibility is an acceptable approach.

Finally, the subcommittee takes note of the fact that confusion exists as to the meaning of certain key sections of the act and that the Judiciary has resolved this confusion in favor of the minimum required standard with the maximum agency discretion. The subcommittee feels that legislation to amend the Regulatory Flexibility Act is needed to strengthen and clarify the Act to fulfill the intent of Congress.

III. Background

A. Implementation History and Scope

The Regulatory Flexibility Act of 1980 (hereinafter called RFA) [4] was passed by the Senate on August 8, 1980, and the House of Representatives on September 8, 1980, and signed into law September 19, 1980, to be effective Janauary 1, 1981. It supplemented the Ad-

[4] Appendix A. 5 U.S.C. Sections 601-612; P.L. 96-354.

ministrative Procedures Act (APA) [5] by adding a new Chapter VI thereto. The purpose of the RFA was plainly stated:

> to estabiish as a principle of regulatory issuance that agencies shall endeavor * * * to fit regulatory and informational requirements to the scale of business * * * subject to such regulation * * * and to solicit and consider flexible regulatory proposals and to explain the rationale to insure that such proposals were given serious consideration.[6]

The bill was one of a number of legislative efforts to bring responsibility to the growing regulatory process. These efforts would ultimately include the Paperwork Reduction Act [7] which caused agencies to justify the recordkeeping requirements they were imposing on businesses and individuals; and the Equal Access to Justice Act [8] which would provide reimbursement to entities or individuals for legal action which, among other things, could challenge regulations that were not well-founded. Another influence on the regulatory process was Executive Order 12291, [9] which was signed by President Reagan in one of the earliest acts of his Administration. The Order stresses consideration of the cost effectiveness of alternatives that are proposed in major rules, that is, rules which have an effect on the economy of $100 million or more. These laws, when added to the existing regulatory foundation of the APA, filled the gaps and helped assure a solid groundwork of responsibility under our system of laws. This is especially important since now, due to the sheer complexity of our times, the country must rely more and more on bureaucratic discretion and regulation instead of legislation.

The subcommittee's main concern was to insure that "small entities," principally small businesses, are being considered under the RFA when agencies are "required by section 553 of (the APA), or any other law, to publish a general notice of proposed rulemaking for any proposed rule." [10] The RFA has now been in place for five years and the subcommittee undertook a series of hearings and informal inquiries during the second session of the 99th Congress to review the implementation of the RFA and see if it is achieving its intended purpose. If not, the subcommittee wanted to see what changes might be necessary to clarify, fortify, or facilitate enforcement. Finally, we will make specific recommendations, if necessary, for legislative or other action. The chairman outlined the purpose of the subcommittee's hearings and thus this inquiry:

> These hearings serve a number of useful purposes. They inform us whether the agencies are doing what is required to carry out the intent and spirit of the laws we pass in Congress. They provide us an opportunity to compare the level of compliance in the various agencies and further to determine which management systems produce the desired

---

[5] 5 U.S.C. Sections 551-559, 701-706.
[6] P.L. 96-354 Section 2(b).
[7] 44 U.S.C. Sections 3501-3520; (P.L. 96-511).
[8] P.L. 96-481.
[9] 46 Federal Register 13, 193—E.O. 12291 superceded E.O. 12044 under the Carter Administration which is referred to in the Floor debate on the RFA.
[10] 5 U.S.C. Section 603(a); Appendix A.

analysis in the most effective way. They give the agencies and affected businesses the opportunity to share their opinion and experience with us about how the law should be applied and what problems should be raised. Most importantly, it gives the members of this subcommittee and the Congress an opportunity to reflect on our policy and consider changes, if necessary.[11]

B. REQUIREMENTS OF THE RFA

Included in the appendix to this report is a copy of the RFA and copies of all the United States Code sections referenced in the body of the RFA. Also included is the section-by-section comprehensive analysis that accompanied the bill during its original consideration.[12]

It is useful to summarize what the RFA is supposed to require and the methods it prescribes. (All section references are to the RFA (5 U.S.C. Sections 601–612) unless otherwise specified.)

1. Certification or Analysis of Rules

Any regulatory agency that files a notice of proposed rulemaking required by section 553(b) of the APA[13] (or any other law) must either *certify* that the regulation they are promulgating has no significant economic impact on a substantial number of small entities (section 605(b)) or they must publish an *initial regulatory flexibility analysis* (section 603) which assesses the impact the bill will have on small entities and suggests alternatives that may be less burdensome. After public comment, the rulemaking agency must make available a *final regulatory flexibility analysis* (section 604) which details how they considered the needs and comments of small businesses when they drafted the final rule.

2. Monitoring Compliance

The Chief Counsel for Advocacy of the Small Business Administration (also called the Advocate) is to assist small business by monitoring agency compliance with the RFA. The Advocate does this by assisting agencies to comply, by commenting on proposed rules, by reporting to Congress (section 612(a)) or by filing an amicus curiae brief in any court action brought to review a rule (section 612(b)).

3. Outreach

Small entities may not follow agency rulemaking routinely so provisions are made in the RFA to publish a semi-annual regulatory flexibility agenda of rules that will be promulgated in the near future (section 602(a)). Provisions are also made requiring agencies to seek out those who will be affected, to notify them of the rulemaking, (section 602(b)) and to devise ways to solicit and include the views of small entities in the process (section 609).

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[11] Opening statement, Chairman Skelton, Implementation of the RFA hearings, page 167.

[12] Appendix A & B. The section-by-section analysis has figured prominently in judicial efforts to sort out the act. The RFA, as we know it, was offered in the Senate as an amendment in the nature of a substitute. The courts have used this section-by-section as the most thorough map of what Senator Culver intended.

[13] 5 U.S.C. Section 553(b).

4. Judicial Review

Interlocutory review of agency rules based on the RFA is prohibited by the RFA. Courts can, however, consider analyses developed as a result of the RFA when the reasonableness of the rule is challenged in court (section 611).

5. 10-year Plan

Finally, the RFA directs agencies to set up a plan so that all significant regulations can be systematically reviewed within 10 years. The agency is to determine which rules shall be continued, amended or rescinded consistent with the goals of the RFA. Public notification and participation are required in the review process (section 610).

IV. Problem Areas

A. CERTIFICATION AND JUDICIAL REVIEW

1. Circumvention of RFA

The RFA was not intended to be an impediment to needed regulation. Four ways are provided to short circuit the system when circumstances warrant. The RFA permits an agency head to waive or delay the initial regulatory flexibility analysis and to delay the final regulatory flexibility analysis for up to 180 days in cases where "the final rule is being promulgated in response to an emergency that makes timely compliance * * * impracticable." [14] The subcommittee did not receive any testimony that would indicate this emergency clause was being abused. In fact, the Chief Counsel for Advocacy has informed us that the procedures for waiver and delay are infrequently used and appear to be justified in those few cases where the procedure is invoked.

This procedure is not to be confused with a number of cases cited by the Advocate where the initial regulatory flexibility statement is simply skipped or replaced by a request for comments from affected small businesses, without any analysis. Nor would it provide cover in the cases where the rule is called an "interim rule," given immediate effect and the opportunity provided for those small entities who were ignored to comment later.

Another method to circumvent the regulatory flexibility analyses normally required by the RFA is permitted when other analyses required by other laws suffice. The RFA provides that: "Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections." [15] Again, we have no evidence that indicates this section is being abused. Indeed we are informed that the agencies work together and share information on occasion.

The subcommittee received no testimony, whatsoever, that any agency has ever used the "good-cause" exemption provided for in

[14] 5 U.S.C. Section 608.
[15] 5 U.S.C. Section 605(a).

the APA which worried some commentators when the RFA first went into effect.[16]

By far the most used provision of the RFA is section 605(b) which reads as follows:

> (b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.[17]

Clearly, the original intent of the provisions was that some preliminary research should be done to see if a "significant economic impact" was going to be felt by a "substantial number of small entities." Unfortunately, it has not worked out this way. In many cases, certification, with no apparent investigation or foundation, has been the quick way out for agencies who prefer not to comply with the RFA.[18]

Frank Swain, the current Chief Counsel for Advocacy, who, by law, is the "watchdog" for the RFA, told the subcommittee:

> All that we really ask, even if agencies disagree with us, is that they put on the record why they disagree with us, or why they do not think their rule has an impact on the small firms or why they do not think the impact is very bad. The most frustrating situation is when an agency says, regardless of what we submit, that their rule has no impact at all. I would much rather deal with an agency that says we measure the impact differently and we cannot make this change. We still have too many agencies that wish away small business impacts by certifying too quickly.[19]

In his section-by-section analysis of the RFA (known as S. 299 at the time), Senator Culver, the author of the version of the bill that became law, discussed the need for preliminary study:

> The term "significant economic impact" is, of necessity, not an exact standard * * *. Any more specific definition

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[16] 5 U.S.C. Section 553(b)(B).

[17] 5 U.S.C. Section 605(b) in fact, it is hard to believe that this section of the agency law books is not completely worn out. 965 out of 1044 substantive regulations sent to the SBA in 1986 were certified as having no significant economic impact on a substantial number of small entities. There are perhaps a thousand more regulations that were published in 1986 but most were simple technical changes or simply too minuscule to warrant review, according to the Advocate.

[18] For examples, see the 1986 Annual Report of the Chief Counsel for Advocacy on the Implementation of the Regulatory Flexibility Act or see the testimony of Frank Swain, Implementation of the RFA Hearings, starting at p. 3.

[19] Testimony of Frank Swain, Chief Counsel for Advocacy, Implementation of RFA Hearings, p. 31.

> *would require preliminary work* to determine whether the regulatory analysis must be prepared. *But the same is true if the definition is a general one like "significant economic impact."* Thus, it would seem there is little to gain and perhaps some to lose in terms of equity and flexibility by trying to predetermine what is a significant economic impact through definitional language. (Emphasis supplied.) [20]

He made clear to the Senate his intention that at least some preliminary research must be done and then, by Statute, a "succinct statement explaining the reasons for such certification" [21] should be published along with the notice of proposed rulemaking.

During the debate in the House of Representatives, the members of the Small Business Committee spelled out precisely their intention that a regulatory flexibility analysis, or a well-founded certification, be done. They also stressed that comments by affected parties to the agency must be considered. If they failed to do this, then the committee and the House of Representatives intended that the agency would risk having their rule invalidated by the courts:

> Mr. BROOMFIELD. Mr. Speaker, repeating the question, but what if the agency fails to do this analysis, or if the analysis is inadequate, sloppy or incomplete? What if the agency ignores significant information provided by an affected individual; or, more importantly, what happens if the agency ignores its own findings or makes a conclusion that is not in keeping with its own facts?
>
> Mr. MCDADE. Mr. Speaker, again I want to commend my friend. The question, I think, is terribly important as we establish the legislative history of this piece of legislation. Let me say unequivocally, as a member of the committee that wrote this bill, that in that instance, upon review of the final regulation, *it is the intent of our committee that the court should strike down the regulation.*
>
> Now, I must make it clear that there are no intermediate court reviews. The only review will be for final regulations; but when the court does review it, and I now speak for my friend, the gentleman from Iowa, the distinguished chairman of the subcommittee on this, when the court finally does review it, then we intend that this regulation shall be invalidated." (Emphasis supplied.) [22]

Andy Ireland, Congressman from Florida and the principal proponent of the bill in the House said in the accompanying explanation that "ascertaining the impact on small entities is the heart of regulatory flexibility analysis".[23]

Unfortunately, this clarity of purpose was shortlived because Senator Culver, perhaps unknowingly, had already cut the heart out of the bill in another part of his report:

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[20] 126 Congressional Record 16 pp. 21460—see Appendix (B).
[21] 5 U.S.C. Section 605(b).
[22] 126 Congressional Record 19 pp. 24583-24584.
[23] 126 Congressional Record 19 p. 24588.

> Section 611(b) provides that the contents of the Regulatory Flexibility Analysis shall, to the extent relevant to an issue before the court, be available to and considered by the court when the court is determining the validity of the rule which is subject of the analysis. * * * This means, for example, that the decision by an agency with regard to what proposed rules have a significant economic impact on a substantial number of small entities pursuant to section 605(b) (certification) shall not be subject to judicial review. Thus a decision, as to whether the agency shall conduct a regulatory flexibility analysis, remains in the sole discretion of the agency.[24]

It may seem harmless, but that little paragraph by Senator Culver, tucked away in one hundred pages of legislative history has been enough for Justice Scalia in *Thompson* v. *Clark* [25] and Judge Troutman in *Lehigh* v. *Block* [26] to deny relief to petitioners who were seeking to invalidate a rule as unreasonable where the agency made no attempt to comply with the RFA.

In fact, Senator Culver's analysis, and the courts' interpretation, have a disastrous side effect: If an agency makes a good faith effort to comply with the RFA, and does *some* analysis, it runs the risk of having the information it compiled used against it to invalidate the rule. Thus, there is confusion about what the Senate intended to pass.

One of the confused was apparently Senator Culver; later in the same report he contradicts his above quoted remark and states:

> For example, in the unlikely event that, following an agency head's decision not to certify that a particular rule will have no significant economic impact on a substantial number of small entities pursuant to section 605(b), the agency then, completely ignores the resulting requirement to perform regulatory flexibility analysis, an injured party would have grounds to argue that this fact is evidence of the unreasonableness of the rule. Similarly, if it can be demonstrated that a regulatory flexibility analysis has not been prepared in good faith and the agency, therefore, is unable to provide substantive grounds supporting the final rule in the statement of basis and purpose, the court would have grounds to invalidate the rule.[27]

Further, by letter, in response to a request for clarification by the Speaker, the day before the House of Representatives debated the bill, Senator Culver strengthened the above statement by adding "consciously" after "completely" and his letter (now clarified to give an endorsement to alternate court review) was presented to the House for their consideration.[28] The Senate never

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[24] 126 Congressional Record 16 pp. 21457 and 21460-61 (1980). See Appendix (B).

[25] See *Thompson* v. *Clark* 741 F 29 401 (1984), Justice Scalia was then Circuit Judge, D.C. Circuit Court of Appeals.

[26] See *Lehigh Valley Farmers* v. *Block, Secretary of Agriculture et al,* 640 F. Supp. 1497 (1986).

[27] 126 Congressional Record 19 p. 21457.

[28] 126 Congressional Record 19 p. 24586, Letter from Senator Culver to Thomas P. O'Neill, the Speaker of the House of Representatives.

brought his original statement up in debate. Finally, during the debate, neither the House nor the Senate endorsed Senator Culver's interpretation that certification was discretionary. The House did not even have it in the record for them to consider. The courts have concluded, however, that dicretionary certification is what Congress intended, and that conclusion, to the surprise of many who participated in the debate, is the state of the RFA today.[29]

2. Legislative Response

The court in *Lehigh* v. *Block* says of the apparent conflict in the law:

> * * * we believe his (Senator Culver's) explicit statement that it is within the agency's sole discretion as to when a flexibility analysis should be performed. We would be less than candid if we did not recognize that Congress theoretically rendered sections 603 and 604 of the RFA nullities based on sections 605 and 611. *However, it is for Congress to correct this anomaly if it so desires.* (Emphasis supplied.)[30]

The subcommittee found that some witnesses, when asked directly, believed that the lack of judicial review prevented them from defending their rights. For example, two witnesses testified that judicial review should be part of the law:

> Mr. SKELTON. You have both indicated—you say, some substantial problems that are being ignored by the FCC. Do you have a recommendation, each of you, for us?
>
> Mr. MELLON. My question to my counsel was, well, why don't we just—if they have ignored the law, why don't we just take them to court and solve the problem?
>
> And his answer to me is there is——
>
> Mr. SKELTON. No judicial review.
>
> Mr. MELLON [continuing]. There's no judicial review, and, if there was he would do that on my behalf and on behalf of others like my company that he represents.
>
> Mr. SKELTON. In other words, your recommendation would be to take out that word "not"?
>
> Mr. MELLON. Clearly.
>
> Mr. SKELTON. And require judicial review, or allow it. How about you?
>
> Mr. DUNDON. I would agree with that conclusion also, Mr. Chairman. * * *[31]

The SBA Chief Counsel for Advocacy's office stopped short of urging full interlocutory judicial review, probably because they are

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[29] It should be pointed out that at least two members of the House saw a similar train coming down the tracks. Representatives Levitas from Georgia, for example, pointed out on the floor . . . "all of the language in the legislation could be totally ignored by any agency. There is no effective enforcement mechanism. This legislation can be disregarded by the same bureaucrats who are trampling over small business rights now" (See 126 Congressional Record 19 p. 24581).

[30] *Lehigh Valley Farmers* v. *John R. Block, Secretary of Agriculture*, 640 F. Supp. 1497 (E.D. Penn 1986).

[31] Implementation of the RFA Hearings, p. 236. The "not" that Mr. Skelton refers to is found in 5 U.S.C. Section 611(b) which says agency determinations "shall not be subject to judicial review".

more familiar with the legislative history.[32] Separate judicial review, it was felt during the formulation of the RFA, could provide a tool for opponents of a regulation to delay its promulgation. It is clear that Senator Culver was motivated by a desire to limit the ability to challenge a regulation to one review and one standard. In the section-by-section analysis he stated:

> Section 611(a) states that agency determinations concerning whether the provisions of the bill apply to any action by the agency—including a decision by the agency head to certify that a rule will not have a significant economic effect on small entities—shall not be subject to judicial review. To do otherwise would be counter to the key principle underlying the Administrative Procedure Act that only the final rule is subject to the "arbitrary and capricious" standard usually described as the "reasonableness" standard.[33]

It is clear, however, that some enforceable standard needs to be adopted to clarify which agency decisions the courts can or cannot review. The subcommittee finds that the intent to avoid dilatory tactics which might unduly delay the promulgation of regulations is an important consideration. The subcommittee recommends that amendments to the RFA be considered to clarify the Congressional intent. It should be specified that the decision by a rulemaking agency to certify that a proposed regulation has no significant impact on a substantial number of small entities should at least be subject to judicial review as part of the record if that rule is ever reviewed for "reasonableness." Further, a legislative history should be made to clearly delineate that an unfounded certification can provide grounds to invalidate a rule, particularly in a case where the agency was made aware, during the public comment period on the proposed rule by credible evidence, that a significant impact on small entities will result.[34]

The above approach stops short of full judicial review, but still provides the backstop which we believe the Congress evisioned. Perhaps full judicial review should be considered in another five years if the RFA continues, in some cases, to be ignored.

B. BORROWED DEFINITIONS

During the drafting of the RFA, the authors borrowed from and referred to established law to homogenize the RFA into the existing regulatory scheme. This is a common legislative practice, particularly where terms of an act might come into question. Borrowing an existing definition gives the new law a solid base of interpretation, familiarity, continuity, even a judicial history to minimize the confusion of instituting a new system. Occasionally, however, there are parts of the definition which may make sense for one law and are helpful in achieving one set of goals, but confuse

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[32] For examples, see the testimony of Doris Freedman, Implementation of the RFA, pp. 171-172.

[33] 126 Congressional Record 21458 (1980).

[34] This is precisely the reason that the word "consciously" was added to the legislative history in the letter to the Speaker of the House, according to at least one party to the negotiations. (See note 28 supra.) Unfortunately, the Courts have chosen to ignore this language.

or fail to support the purpose of their adopted law. The terms "dominant in its field of operation" and "interpretive," which are borrowed from the Small Business Act [35] and from the Administrative Procedures Act (APA) [36] respectively, are two examples of words that work well in their intended place but create problems when transplanted, in this case to the RFA.

1. "Dominance"

a. Background.—The RFA definition of "small business" borrows from the Small Business Act which excludes a small business if it is "dominant in its field of operation." [37] This definition serves the Small Business Act well enough because, by and large, the goal of that Act is to enhance competition by supporting small businesses with grants, loans, or by requiring that the Government give special consideration to small businesses in procurement or service contracts. A small business that is "dominant in its field of operation" does not need help to be competitive and therefore was excluded by definition from the Small Business Act.

The goal of the RFA, on the other hand, is to protect small businesses from being regulated to death. This is to be done by tailoring the amount of regulation imposed and paperwork requested to fit the capabilities of the businesses subject to regulation.[38]

Some agencies, however, use dominance to avoid the RFA. The FCC, for example, certified that they were not required to perform a regulatory flexibility analysis of their tariff requirements because it would have no significant impact on a substantial number of small businesses. In their view, small telephone companies provide exclusive service for their allocated area, and are monopolies by their own admission, therefore, they must be dominant in their field.

Doris Freedman of the Chief Counsel for Advocacy's Office pointed to the FCC as an example of an agency that is misapplying the definition and wrongfully avoiding the RFA:

> The FCC has avoided regulatory flexibility analysis by attempting to exclude groups of small businesses from Regulatory Flexibility Act (RFA) coverage.
>
> For example, the Commission has determined that small telephone companies are dominant entities in their areas, and as such are not small businesses as covered by the Regulatory Flexibility Act.
>
> By making this finding, the FCC determined that they do not have to analyze their proposed rules as they relate to small telephone companies. This conclusion is not supported by the Small Business Administration regulations, which define dominant in the field. Dominance is not geographical as the FCC seems to imply from their findings. Rather, the SBA definition is as follows: "A concern is not dominant when it does not exercise a controlling or meas-

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[35] Section 3 of the Small Business Act, P.L. 83-163, 15 U.S.C. Sections 631-647.
[36] 5 U.S.C. Section 553(b) see Appendix B.
[37] 15 U.S.C. Section 632 see Appendix A.
[38] 5 U.S.C. Section 601 note; P.L. 96-354 Section 2 Regulatory Flexibility Act finding and purposes supra note 6.

> urable influence on a national basis in a business activity in which a number of business concerns are primarily engaged." [39]

At the subcommittee hearings and at subsequent informal meetings, owners of small telephone companies and representatives of telephone company associations told of the problems that the lack of regulatory flexibility is causing them. Lorinda Ackley, president of the Tatonic Telephone Corporation of Chatham, New York, testified that the cost to perform the studies necessary to justify the tariffs required by the FCC in the "New Era" of telephone deregulation prevented small companies from competing. Her small company had to spread the $40,000 cost for a feasibility study over their 18,000 customers.[40] She points out the effect this extra cost had on the small telephone companies in Wisconsin:

> In Wisconsin, out of 96 small telephone companies, none have filed their own traffic-sensitive tariff because of costs. Two large Wisconsin companies, Bell and GTE, have a larger customer base over which to spread costs, and both have filed tariffs.[41]

Under the rules currently in force, Bell and GTE will probably be able to raise their rates. The small companies will not even be able to afford to find out if they can. When an agency accepts their own definition of "dominant" and ignores the RFA and the SBA's regulations interpreting the RFA, then Congress should recognize that the term "dominant" is a bad fit for purposes of the RFA. The subcommittee finds that changes should be considered to either clarify that part of the small business definition or eliminate the term.

b. Current FCC Approach.—It would be less than candid not to point out that the FCC has done a great deal to deregulate the telecommunications industry and thereby create new opportunities for small businesses in some service areas. As the Chairman of the Commission told the subcommittee at the hearing May 22, 1986, "I personally am not used to the criticism that we (FCC) did not deregulate enough—that we have been too regulatory. This is my first occasion to face it." [42] At the suggestion of the subcommittee, Mr. Fowler and his staff met informally with the subcommittee and industry representatives to get background information, on, among other things, the need to examine the impact of FCC actions on small businesses. Mr. Fowler promised to put such considerations on a "fast track." On December 4, 1986, as this report was going to press, the FCC announced proposed rules designed to reduce the burdens faced by small telephone companies.[43]

The thrust of the decision is to reduce the regulatory burden on small businesses by simplifying complex procedures such as tariff filings and rate settings, by reducing the number of filings and by

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[39] Testimony of Doris Freedman, Implementation of the RFA Hearings, p. 169. See also 13 CFR 121.3.

[40] Testimony of Lorinda Ackley, Implementation of the RFA Hearings, pp. 179-185.

[41] Id., at p. 179.

[42] Testimony of Mark Fowler, Chairman of the Federal Communications Commission, Implementation of the RFA Hearings, p. 257.

[43] FCC docket No. 86-467 Section 50.

setting a threshold for treatment as a small business (50,000 lines or less). On December 22, 1986, Chairman Fowler sent a letter to the subcommittee informing the subcommittee of the FCC's intention to apply the RFA to rulemakings which will affect small, independent telephone companies. (See Appendix D.) While the subcommittee is pleased by the response of the FCC in taking this step in the right direction, the subcommittee still feels that policy behind the RFA might be better served if the term "dominant" was changed or deleted from the RFA.

2. "Interpretive"

a. Background.—The RFA borrowed another definition which, though soundly based, does not always serve the purpose of the RFA. It defines a "rule" as any rule "for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of the APA or any other law."[44] Section 553(b) provides: "* * * Except when notice or hearing is required by statute, this subsection does not apply (A) to interpretive rules."[45] In other words the RFA applies only to regulations for which a notice of proposed rulemaking is required and a notice of proposed rulemaking is not required for interpretive rules.

What is an interpretive rule? The Commissioner of the IRS told the subcommittee what the IRS uses to determine an interpretive versus a legislative rule (which is not exempt):

> Primarily the degree of discretion that we have in applying the rules. In other words, if the statute is not specific but says "this is the objective we want to achieve and you (IRS) write the rules to achieve it," we regard those as legislative; but when they say "these are the rules," obviously then they are interpretive.[46]

Most statutes, particularly tax statutes, have directives that require simple interpretation; but intermingled with the directives are questions, definitions, and gaps that will require the IRS to use its judgment. The small business community and the subcommittee feel that time and money could be saved if the IRS applied the RFA when forming those judgments.

b. Auto Log Example.—The case most familiar to small business groups and the subject of a hearing by the subcommittee on Tax, Equity and Access to Capital of the Small Business Committee[47] is the so-called *Auto Log* case. The Deficit Reduction Act of 1984 provided that a businessman could no longer claim a deduction on his income taxes for the business use of his car unless "adequate contemporaneous records" were kept. The previous standard required "sufficient evidence corroborating his own statement" but this was deleted by the Deficit Reduction Act and can no longer be used.[48]

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[44] 5 U.S.C. Section 601 (2) (b).

[45] 5 U.S.C. Section 553(b), see Appendix A.

[46] Testimony of Roscoe Egger, Commissioner of the Internal Revenue Service, Implementation of the RFA Hearings, p. 70.

[47] See IRS Automobile Recordkeeping Regulations, Hearings before the Subcommittee on Tax, Access to Equity Capital and Business Opportunities, Committee on Small Business, 99th Congress, 2nd Sess.

[48] The Deficit Reduction Act of 1984 (P.L. 98-369).

The Conference Report accompanying the bill states:

> The conferees expect that these records will reflect with substantial accuracy the business use of the property. The records must indicate the business purpose of the expense or use, unless the business purpose is clear from the surrounding circumstances. With respect to automobiles, logs recording the date of the trip and the mileage driven for business purposes must be kept.[49]

The IRS maintains that the contemporaneous recordkeeping requirements were a classic case of interpretive regulations. They insist they were simply carrying out Congressional orders which they were powerless to change or control.[50] Yet IRS used their own judgment in deciding what Congress meant by "adequate contemporaneous records." In the IRS view, this required a daily log of date, purpose (whether business or pleasure), users name, place of use, odometer readings, and length of use (if appropriate) as well as other related expenses. When public pressure grew and it became obvious that the reporting costs far outweighed the benefits gained, the IRS proceeded to amend their regulations and adopt tiered alternatives in certain cases.[51]

Clearly then, the IRS has at least some discretion to exercise their judgment in interpretive rulemakings. The subcommittee feels it might just benefit their procedure if the RFA was applied. As Congressman Ireland pointed out in the hearing:

> If you (IRS) were doing the regulatory flexibility analysis that many of us think you ought to be doing all along, you would have come up with that (proposal) and said, "Look, in order to gain $150 million it is going to cost the taxpayers $3 billion in extra paperwork" and the debacle would not have happened.[52]

c. Small Business Support.—The first White House Conference on Small Business called by President Carter, listed as one of its top priorities that Congress should "require that Federal agencies which develop fiscal, monetary, legislative, and regulatory policies or practices shall submit small business economic impact statements."[53] Later that year, the RFA was passed and that recommendation became law.

Six years later, in August of 1986, at the White House Conference on Small Business, convened by President Reagan, the delegates reviewed the progress in implementing the RFA now that it is law. Once again, Regulatory Flexibility Analysis was made a top priority. One thousand one hundred and thirty-seven delegates,

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[49] Conference Report in H.R. 4170, U.S. House of Representatives, Report No. 98-861, p. 1031.

[50] Testimony of Roscoe Egger, supra, p. 71. See IRS Automobile Recordkeeping Regulations Hearing, supra, testimony of John Motley, director of the National Federation of Independent Business for a thorough discussion of the cost-benefit analyses regarding the recordkeeping requirement. Mr. Motley also points out how valuable a regulatory flexibility analysis would have been.

[51] 26 CFR 1.274—5 T.

[52] See Congressman Andy Ireland, Implementation of the RFA Hearing, p. 75.

[53] See "Report to the President, American Small Business Economy", White House Commission on Small Business, April 1980, p. 57.

representing thousands of businesses all over the country, made the recommendation that:

> * * * Congress shall enact legislation which shall include the IRS and all other agencies within the requirements of the Regulatory Flexibility Act of 1980. The action or inaction of all Federal Agencies shall be subject to judicial review under the Regulatory Flexibility Act.[54]

The fact remains that the IRS and their regulations and paperwork requirements have the single biggest impact of any Federal agency on the small business community, clearly taking up more time and effort in the name of the Federal Government than any other requirement. The IRS, however, seems content to draw up a large proportion of their regulations in a vacuum, with no idea, in many cases, what imposition they make on the time and resources of the small businessman.

d. Voluntary Compliance or Legislative Response.—The IRS could voluntarily comply with the RFA but instead informed the subcommittee that they would not and would oppose any legislation that would automatically include them.

First, the Commissioner said in his testimony that it would be unfair to have separate requirements for small businesses. Yet, different reporting requirements based on size are a common feature of our tax laws, which include thresholds for taxes, tax bracketing, and simplified forms (1040 EZ, short forms). Such considerations have been in place for years.

Second, the IRS points to the hardships the RFA would cause them. They already have a 400 regulation backlog. The purpose of the RFA, however, was not to make regulating easier for the agency but to shift the hardships of justifying regulations to the agency from small business so that the agency is no longer regulating in the dark.

The subcommittee takes note of the proposal in the Senate version of the Tax Reform Act of 1986 that would have brought all regulations promulgated by the IRS under the RFA. In spite of the deletion of that provision (offered by Senator Sasser) the subcommittee finds that the overwhelming majority of small businesses want the IRS to consider the impact of their regulations and earnestly consider less burdensome alternatives.

The subcommittee recommends that Congress consider such legislation. In the alternative, Congress should perhaps make the decision to label regulation "interpretive" subject to judicial review where comments raise legitimate issues regarding discretion as applied in the rules.

C. DIRECT AND INDIRECT REGULATORY EFFECTS

Another controversy (which was typified at our hearings by the regulatory policy of the FCC) is caused by the close connection some agencies require between themselves and those who feel the impact of their regulations before the agency will apply the RFA. In the FCC case that was brought to our attention, a subculture of

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[54] See the White House Conference on Small Business, A Report to the President of the United States, November 1986, p. 25.

businesses called "WATS line resellers" *was created* to compete with the large long distance service providers *by the FCC.*[55] In spite of this, the FCC feels that this connection is not direct enough to warrant analyses of the small business impact of rules they make which affects the cost of operation for WATS resellers. Mr. Dennis B. Dundon, the president of a small reseller business, explained the situation to the subcommittee:

> Beginning in June 1981, the FCC allowed the resale of AT&T WATS services to the general public on a per-call basis. Having been invited in by the FCC, this decision spawned a whole new industry of entrepreneurial companies—classic small businesses. There were as many as 500 of these small businesses whose owners had, in some cases, literally bet their life savings on this new telecommunications opportunity. This is a great example of small business helping small business. While large companies could economically construct WATS networks of their own (because of their large usage levels), resellers gave small businesses meaningful access to long distance savings for the first time, allowing them to be more competitive through control of their telecommunications cost—a major operating expense category. * * * I do hope I can give you an appreciation for the speed and magnitude of the changes in regulations and tariff terms and conditions (sanctioned by the FCC) which make long-term planning—not a strong suit in most small businesses—at best a three-month horizon. So you have an idea of the magnitude of these charges for my company; in 1984 we paid $283,000 in access charges (set by the FCC) to the local telephone companies in our region. In 1985 these charges had grown to $2,081,000.[56]

Up to this point, WATS line resellers did not pay full scale "access charges," [57] they simply paid a small percentage of such charges indirectly through the purchase of WATS lines from AT&T. On January 6, 1986, the FCC issued a Notice of Proposed Rulemaking which became a Final Rule on March 13, 1986, to force WATS resellers to pay access charges directly to the local telephone service providers thereby wiping out most of the profit for any resellers and eliminating many of the small market competitors leaving the "looming oligopoly" of a few long-distance providers.[58] Interested parties were given only three weeks to learn about the issue and respond; even then arguments of these small businesses that an RFA analysis was required were answered in a footnote in the Final Order which read:

> We have previously determined that the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601-12 (1982), are not applicable to proceedings in this docket in that local

[55] FCC Docket No. 20097.
[56] Testimony of Dennis Dundon, Implementation of the RFA Hearings, pp. 202-209.
[57] Access charges are the charges long distance service providers pay to access local systems such as Bell Operating Companies.
[58] FCC Docket 86-1.

> exchange carriers, the parties directly subject to our rules, do not fall within the act's definition of a "small entity".[59]

The subcommittee found that, as a result of this order, hundreds of small businesses will sell out or cease to exist, representing the demise of a sizable portion of the WATS resellers population.[60] It would therefore seem that the criteria of the RFA, that the regulation have a substantial economic impact on a significant number of small entities, is met. In testimony before this subcommittee the FCC justified their decision on the basis of a 1985 D.C. Circuit case called *Mid-Tex Electric Co-op, Inc.* v. *FERC.*[61]

In that case, an energy wholesaler who purchases electricity from a utility and resells it, petitioned to overturn an action of the Federal Energy Regulating Commission (FERC) which would raise the wholesalers rates substantially. After remanding the case for other reasons, Judge Bork, speaking for the court, felt compelled to tackle the argument made by petitioner that the rule was unreasonable because FERC failed to perform the analysis required under the RFA. Ignoring the *Thompson* v. *Clark* [62] case decided by the D.C. Circuit a few months earlier and which held that certification, because of confusion in the law, was within the sole discretion of the agency, Judge Bork wrote that the RFA only required the agency to look at the impact of those small entities *directly* regulated by the agency. "Reading section 605 in light of section 603, we conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities *that are subject to the requirements of the rule.*" (Emphasis provided to show the words that the court added to the statutory language.)[63] The court in *LeHigh* v. *Block* apparently felt the decision was a little unusual as well:

> We cannot explain the District of Columbia Circuit Court's failure in *Mid-Tex Electric Cooperative, Inc.,* v. *FERC supra* to rely upon its earlier decision in *Thompson* v. *Clark supra* and to instead rely upon its finding that the Plaintiffs lacked standing to challenge the agency's certification pursuant to section 605(b).[64]

The case at hand is different in that the WATS line resellers compete in the open market against the company they purchase WATS service from and thereby make a competitive product to new customers. The FCC ruling will not injure all AT&T customers but it mortally wounds some small businesses and diminishes competition. There is a much closer regulatory connection than in the *Mid-Tex* case.

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[59] FCC Docket 86-1; Access Charge Order at pages 358-362 (they refer specifically to 5 U.S.C. Section 601).

[60] Testimony of Ron Mellon, Vice-President of Telephone Communications Corp. of Vail, Colorado, where he ended his testimony by announcing: "In view of the impending change, FCC has tentatively concluded that it cannot operate any longer as a small business," Implementation of the RFA Hearings, p. 224.

[61] *Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F2d 327, (DC Cir 1985).

[62] *Thompson* v. *Clark,* supra.

[63] *Mid-Tex Electric Co-op. Inc.* v. *FERC, supra* p. 342.

[64] *Lehigh Valley Farmers, Inc.* v. *Block, supra,* footnote 21.

The subcommittee cannot be sure if any other agencies will give weight to the *Mid-Tex* case but the FCC and presumably the FERC are currently relying on it. The subcommittee feels that since Congress intended to foster competition, not eliminate it, the connection necessary between the agency and the small business required to apply the RFA should be clarified. The Congress should specify that where the impact is severe and the cause and effect obvious in the case of small businesses, then the law should be construed liberally to require a regulatory flexibility analysis.

D. RFA AND OTHER LAWS

The RFA interacts with a number of other regulatory reform measures in addition to the APA. The most important of these are the Paperwork Reduction Act (PRA),[65] Executive Order 12291[66] and the Small Business and Federal Procurement Competition Enhancement Act.[67]

The PRA overlaps in its responsibility with the RFA in that the RFA requires agency regulatory flexibility analyses to contain "reporting, recordkeeping, and other compliance requirements including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record."[68] The Chief Counsel for Advocacy, in his annual report for 1985, pointed out that there have been problems and that rigorous enforcement is lacking: "Small businesses do not believe that they are enjoying the full benefits anticipated when the PRA was passed."[69] The Chief points out (and the subcommittee feels he is correct) that the OMB and the agencies could be using the techniques outlined in the RFA to accomplish their goal of reducing paperwork requirements to a minimum while sticking to the middle ground between a mandatory reporting or complete exemption.

The subcommittee takes note of the Advocate's concerns, but also feels that some progress has been made (as the Advocate points out) and that any changes that we might recommend in the PRA would be beyond the scope of our investigation.

The subcommittee finds progress also in the implementation of the Small Business and Federal Procurement Competition Act (called P.L. 98-577).[70] This act has been in effect for two years and requires that regulations that have a "significant effect" or a "significant cost or administrative impact" must be published for comment. The RFA therefore applies, specifically, to procurement regulations, the subject of P.L. 98-577, since the RFA applies to any law which requires an agency to publish a notice of proposed rulemaking.[71] The Advocate pointed out to the subcommittee that in the two years that P.L. 98-577 has applied to procurement, the Department of Defense (DOD), the major procurer, has treated them

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[65] P.L. 96-511.
[66] 46 Federal Register 13, 193.
[67] P.L. 98-577.
[68] 5 U.S.C. Section 603(b)(4).
[69] Annual Report of the Chief Counsel for Advocacy on the Implementation of the Regulatory Flexibility Act, 1986, p. 19.
[70] P.L. 98-577.
[71] 5 U.S.C. Section 603(a).

largely as an afterthought. The implementing regulations were slow in coming and the DOD has been quick to certify with or without support. Further, in some cases where DOD agreed that the RFA applies, the rule was published to be effective immediately and to accept comment later, which partially defeats the purpose of the RFA.

During the hearings, the subcommittee expressed concern about the DOD's willingness or ability to comply with the RFA even after special provisions were passed to instruct them.

The subcommittee made it clear to the DOD that they would be expected to comply with the RFA for all non-national security regulations even if they felt the time constraints were too imposing:

> Mr. IRELAND (for the subcommittee). Your agency (DOD) has ignored the Regulatory Flexibility Act until this last law was passed (P.L. 98-577). According to the good Senator (McCarran) who proposed the Administrative Procedures Act, you should have been covered. . . . You hid under the guise that your agency was not covered (because of the national defense exemption of the APA).
>
> So, we finally had to pass a law saying yes; you were covered. . . . And now you are having to do it and you're telling us you can't do it? Why can't you do it?
>
> Ms. SPECTOR (for the DOD). I am not saying we cannot do it. I am saying we are doing it. What I am telling you though is that it takes 150 hours to do the analysis for each rule we are analyzing.
>
> Mr. IRELAND. Everybody comes in here and complains about the same thing. There are those who do it and make it work and it pays off for the taxpayers of this country.[72]

DOD is the major Federal procurer and one of the major contractors. For these reasons the subcommittee is committed to monitoring the compliance of the DOD with all the requirements of the RFA. It is the subcommittee's opinion that DOD's commitment to the regulatory flexibility analysis would be beneficial to small businesses and an important step toward institutionalizing the RFA.

At this time, the subcommittee makes no recommendations for changes since the DOD has acknowledged that the RFA applies to their procurement regulations at least since the passage of P.L. 98-577. The subcommittee recognizes that P.L. 98-577 has only been in effect for 2 years while the RFA has been in effect for 5 years. This does not excuse DOD noncompliance (or partial compliance) but some time for implementation should be allowed before comparisons between agencies can be drawn. The subcommittee has requested that the Chief Counsel for Advocacy report on the compliance with the provisions of P.L. 98-577 and the RFA by all agencies in the Congressional reports he will file on the RFA during the 100th Congress.

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[72] Testimony of Eleanor Spector, Implementation of the RFA Hearings, pp. 43-44.

V. Efficiency, Creativity, and Innovative Regulation

In order for the RFA to live up to its potential, it is desirable that the Act have enough value to the agency and to the Government (in addition to its acknowledged value to small business) to stand on its own. Additionally, agencies must be able to apply the RFA to real world practical situations, so it must be flexible enough to be enforceable, yet permit creativity and experimentation in its application. This process has been going on over these last five years with good results. The subcommittee would particularly like to highlight a couple of regulatory approaches that the subcommittee feels are promising.

A. COST EFFICIENCY

The subcommittee would like to point out what some agencies who balk at implementing the RFA fail to consider: Namely, that it could save them time and money and bring both sides together to accomplish our goal. The Environmental Protection Agency (for example) advised the subcommittee that the RFA helps them spot trouble areas. The "negotiated rulemaking" technique, where the regulators and the regulated sit down face-to-face and thrash out a regulation, is the type of innovative administrative tool that agencies need in the future. Each interested party knows what is going on, participation is greatly increased, and the regulatory objective is reached quickly.

The subcommittee also takes note of the fact that in some cases in the past, when agencies have resisted the RFA and failed to take account of small business, it has cost the agency (not to mention the taxpayer) time and money. A case in point was the battle over the FCC's regulations in the Rate of Return Reporting Requirement Docket.[73] Robert Fay, president of National Telephone Cooperative Association (NTCA) and director of the Rockport Telephone Company recounted the following story:

> The Commission's original revision of the accounting rules would have greatly increased the reporting and administrative costs for small telephone companies. However, as a result of industry and congressional objections, the commission adopted a modified version of the original plan. While we are pleased that the commission modified some of its proposals so as to alleviate needless burdens on small companies, this 7-year-long proceeding is a prime example of a situation in which the act (RFA) should have been applied. A good deal of time and money could have been saved by all parties involved if the needs and problems of the small telephone companies had been analyzed in the very beginning.[74]

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[73] In the Rate of Return Reporting Requirement Docket, the FCC proposed stricter controls on rates of return of regulated telephone companies. This meant comprehensive reporting requirements for even the smallest telephone companies. Though it was apparent that it was the small companies who lacked the rate base to bear the cost of such accounting, no analysis was ever made because the telephone companies were considered "dominant in their field" by the FCC which then certified that there was no significant economic impact on a substantial number of small businesses.

[74] Testimony of Robert H. Fay; Implementation of the RFA Hearings, p. 173.

B. ENFORCEMENT METHODS

If one of the purposes of the RFA was to compel bureaucrats to be innovative and take the initiative in their activities, then at the very least, they can look for an example to the Chief Counsel for Advocacy who certainly needs to be a most creative bureaucrat to monitor and enforce a law that currently has no apparent penalty for utter failure to comply with its provisions.

1. Compelling Compliance

The subcommittee found, however, that the Advocate does have some weapons. If the agency complies with the RFA and files an initial regulatory flexibility analysis or a final regulatory flexibility analysis, for example, the courts will consider the analyses contents, as well as their defects, as part of its overall judgment whether a rule is "reasonable" under 5 U.S.C. Section 553 and 5 U.S.C. Section 611 (b).[75]

Justice Scalia in *Thompson* v. *Clark* pointed out that:

> Even when an agency decides rightly or wrongly and with or without compliance with the requisite procedures that it need not prepare regulatory flexibility analysis, the impact of the rule upon small entities can be placed at issue in the public comments, and the agency failure to make adequate response to serious alleged deficiencies can, of course, be grounds for reversal.[76]

Though this kind of language can be a useful threat to coerce compliance, the tactic itself is a little thin for a number of reasons. First, it returns the burden to find out about a proposed rule and then assess the impact to either the regulated small business or to the Chief Counsel for Advocacy. If the former, we are right back where we started; if the latter, the court presumes that the Advocate has the capacity, with a total staff of about 45, [77] to analyze the thousands of regulations that are promulgated annually. Second, it might encourage an agency to ignore the requirements of the act initially and only do an analysis if it is publicly brought to the agency's attention in the comments. Neither is an acceptable substitute for proper application of the RFA.

2. Building a Structure To Facilitate Compliance

The subcommittee found that the greatest degree of meaningful compliance comes where agencies have a fixed procedure in place to assist their regulation writers in complying with the RFA.[78] It seems to be infinitely more difficult for the author of the proposed rule to ignore the requirements of the RFA if his superior within the agency might question why he had not followed the complete

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[75] See *Small Refiner Lead Phase Down Task Force* v. *EPA* 750 F2d 539 and *Thompson* v. *Clark* 741 p2d 401 p. 408 (1984).

[76] *Thompson* v. *Clark* 741 F2d at 408 citing *Home Box Office* v. *FCC* 567 F2d 9, 35, 36 D.C. Circuit Court denied, 434 U.S. 829, 98 Sect 111, 54 L.E.D. 2nd 89, 1977.

[77] The Advocate's Office has informed the subcommittee that only 16 professional staffers actually do RFA review work.

[78] See Implementation of RFA, Part 1, beginning at p. 76, for a description of the very effective procedures which the Environmental Protection Agency has in place and see Part II, for copies of the implementing procedures recommended to the U.S. Department of Agriculture.

procedure as outlined in the agency's internal "guidelines for rulemaking" manual. The Agricultural Marketing Service of the U.S. Department of Agriculture (AMS), for example, maintained for years that it is not required to comply with the RFA since their activities are open for public comment, and then voted on by those who are regulated. During the course of our hearings, the General Counsel of the USDA, however, provided the subcommittee with a legal opinion on the applicability of the RFA to the Agriculture Marketing Agreement Act of 1937.[79] The letter clearly spells out the requirements of the law and clearly recommends the procedures that are necessary for AMS to comply with the law; we note that in the six months since that letter has been issued and since the AMS agreed to implement the RFA, the AMS still has been unable to formally decide on the procedures necessary to combine the RFA with its function. Without the standardized procedures for implementation in place there are still no analyses routinely issued with marketing orders.

In an excellent article included in the "1984 Chief Counsel for Advocacy's Report," a detailed study was done to determine what various agencies were doing to comply with section 609 of the RFA.[80] The report reaffirmed what we have seen with regard to agency procedures in other areas: Where there is an established system, with good oversight from the top levels of the agency and with routinized communications to members of the regulated small business community, the RFA can be immensely successful. Without established procedures, agencies fall into a pattern of haphazard outreach, doing nothing to solicit the views of small entities unless some affected individual or trade association found out about the rulemaking and asked for a hearing or other information.

C. NEGOTIATED RULEMAKING

In certain circumstances, a significant short cut to rulemaking which still gives interested parties their opportunity to participate fully in the process is negotiated rulemaking. The Environmental Protection Agency (EPA) is one of the participants in an experimental program to practice this technique—they described their method as a straightforward, three-step process:

1. The agency *identifies all interested* parties, including States and communities, that might have an interest. In the case of a large number of groups or individuals who share a single point of view, the agency may have them meet separately to select a representative who can speak for that group.
2. They *bring* the *group together* to work for a specified period of time on a specified "ball park" proposal. The agency is represented at the meeting.
3. If the group comes up with a proposal that is acceptable to all sides (environmental interests, public interests, regulated community interests), then the agency *publishes* it as a *pro-*

[79] See the Appendix to Implementation of the RFA Hearings.
[80] Annual Report of the Chief Counsel for Advocacy on the Implementation of the Regulatory Flexibility Act, February, 1984.

posed rulemaking for public comment—it then proceeds normally through the rulemaking process.

EPA says of their experience with the system:

> The result is we get much more information early. We get all of the parties in the room ahead of time. We get a much lower probability of litigation about the action and we find that we can move ahead much more rapidly to adopt the regulation with much lower opportunity or chance of making a mistake.[81]

The key here is early and complete participation—and the result is presumably good rulemaking. Properly done, small businesses affected by a regulation would not have to read about it and prepare comments attacking a regulation. These small businesses, or a representative they select, would be invited to help write the regulation. The EPA and the Nuclear Regulatory Commission (NRC), both stated that they have received no complaints in their experiments with this type of "hands-on" rulemaking.

The subcommittee feels that such negotiations could form part of the analysis to satisfy the requirements of the RFA and that this participatory approach may yield a valuable alternative to past rulemaking practices. Increased participations restore faith to the legal system and is very desirable since more and more discretion and decision-making authority has been shifted to the unelected bureaucracy from the legislature.

D. INTRA-AGENCY SMALL BUSINESS OMBUDSMAN

Another interesting program brought to the subcommittee's attention is the appointment of a small business ombudsman within a rulemaking agency. The EPA small business ombudsman, for example, is equipped with the tools and budget to dig out the small business point of view, notify interested parties, present their case to the agency, if necessary, and have review authority over proposed final regulations.

The small business community would be represented by an onsite, well-informed expert who is familiar with their needs. The agency remains in close touch with those who are being regulated and has the "buffer" of an ombudsman to provide a flow of information into and out of the rulemaking process. The ombudsman can help lubricate the system to remove the natural friction that exists between the regulators and the regulated. This is a role which the Chief Counsel for Advocacy has assumed in some agencies, but the subcommittee has found that the perception exists in other agencies that the Advocate is an unwanted intruder. Some bureaucrats seem to fear that they are being watched by the equivalent of the "small business police." [82] An inside ombudsman can

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[81] Testimony of Milton Russell, Assistant Secretary of EPA, Implementation of the RFA hearings, p. 86.

[82] The subcommittee noted that in some agencies the Chief Counsel for Advocacy has a very real problem with confrontation. Career public servants who are approached by the Advocate can be VERY defensive. In a number of occasions in discussions with the subcommittee staff, their attitude was one of "why am I being singled out" rather than "how can I better comply with the law".

overcome this problem by keeping compliance arguments in-house and mobilizing the proper resources to help head off problems.

The subcommittee recognizes that there are problems with this approach such as funding, the addition of another (perhaps time consuming) level in the decisionmaking process and that ultimately the ombudsman must still answer to the agency head. Throughout this report and the reports of the Advocate, the EPA is consistently mentioned as having an efficient, innovative, and comprehensive RFA program. The subcommittee believes that this may be due in large part to the small business ombudsman the EPA has in place.

A great many major agencies already have small business related offices that perform other functions but which could perhaps assume ombudsman's responsibilities at a reduced cost to the Government. Such an assumption could ease the transition to an "in-house" system and help the agencies find smoother, more effective, and more efficient methods of constructive rulemaking. Since the transition to such a system might be an easy way to get creative and faithful compliance with the RFA, such a system should be considered by Congress.

VI. Conclusion

After 25 years, the idea of democratizing our bureaucratic regulatory process is still an appealing one that enjoys widespread support. There is no more "American" idea than giving every citizen a fair chance to have his say, to have his commonsense suggestions listened to and acted upon and then to live and conduct his affairs and his business relatively free of Government hassles. In days gone by, Congress listened to him and then reflected his views with their votes. But as the legislature moves to turning the day-to-day operations of Government over to those who are unelected, either because a certain amount of attention or special expertise is needed or simply because Congress will never have the time again to attend to all the issues that need their attention, a strong network was needed (and provided by Congress) to protect the rights of its citizens.

The Regulatory Flexibility Act, now five years old, is an important part of that regulatory network. If operated properly it makes sure that the little guy (the small town, the small business, or the small association) is sought out and asked his opinions on Government proposals that will influence his life. The RFA ensures that his sensible suggestions will be listened to, checked out, and answered.

The Regulatory Flexibility Act has been a success where it is faithfully and routinely applied. It should be the goal of Congress to make what changes are necessary, to provide whatever encouragement is required, to see to it that the RFA is fully implemented Government-wide. It is the opinion of the subcommittee that the recommendations made in this report, if implemented, will accomplish that goal.

VII. Summary of Recommendations

(1) In the absence of legislation to amend the act, the Chief Counsel for Advocacy should more aggressively:

(a) comment on proposed regulations in the case where an agency head certifies and where the Advocate believes a significant impact on a substantial number of small entities is present. This is the best way to insure that an ignored impact is justiciable;

(b) enter judicial proceedings as an amicus curiae to insure courts are fully and faithfully informed of noncompliance of the law;

(c) push agencies to establish formal procedures for determining whether the Regulatory Flexibility Act applies and then for complying with analysis and comment requirements.

(2) The Chief Counsel for Advocacy should report specifically back to the Congress during the 100th Congress on Agency Compliance with P.L. 98-577.

(3) Congress should consider amending the RFA to clarify that:

(a) the succinct statement required for certification under the RFA should include supportable reasons for the certification;

(b) any court reviewing the "reasonableness" of a regulation under the APA can consider the facts (or lack thereof) that led the agency head to certify under the RFA that a regulation had "no significant impact on a substantial number of small businesses" as part of the record;

(c) an unfounded certification is grounds to invalidate a rule where it can be shown that credible evidence was provided to the agency in the comment period tending to prove a significant impact on a substantial number of small businesses that was consciously disregarded by the agency;

(d) whether a small business is "dominant in its field of operation" is irrelevant for the purposes of the RFA;

(e) either the portion that excludes regulations that are "interpretive" under the APA does not apply for the purposes of the RFA or that evidence provided to the agency during the comment period showing that the agency has discretion in promulgating a regulation shall be part of the record as to the "reasonableness" of the rule when judicially reviewed under the APA;

(f) where the impact on small entities is severe from a regulation and the cause and effect between that regulation and the injury are obvious, the act should be liberally construed to require a regulatory analysis.

(4) The Congress and the Chief Counsel for Advocacy should encourage the adoption of innovative means that clearly comply with the act. In this regard, both the "ombudsman" approach and the negotiated rulemaking have shown promising results. Negotiated rulemaking, particularly, because of the low cost and high public participation, should be more actively refined and recommended by the Advocate. The Advocate should be given the flexibility to waive some requirements of the RFA where evidence exists that the agency undertook a comprehensive, negotiated rulemaking with most points of view covered.

VIII. APPENDIX

PUBLIC LAW 96-354—SEPT. 19, 1980

REGULATORY FLEXIBILITY ACT

Public Law 96-354
96th Congress

An Act

Sept. 19, 1980
[S. 299]

To amend title 5, United States Code, to improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities, and for other purposes.

Regulatory Flexibility Act.
5 USC 601 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Flexibility Act".

FINDINGS AND PURPOSES

5 USC 601 note.

SEC. 2. (a) The Congress finds and declares that—

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

ANALYSIS OF REGULATORY FUNCTIONS

SEC. 3. (a) Title 5, United States Code, is amended by adding immediately after chapter 5 the following new chapter:

"CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

"Sec. 601. Definitions.
"Sec. 602. Regulatory agenda.
"Sec. 603. Initial regulatory flexibility analysis.
"Sec. 604. Final regulatory flexibility analysis.
"Sec. 605. Avoidance of duplicative or unnecessary analyses.
"Sec. 606. Effect on other law.
"Sec. 607. Preparation of analyses.
"Sec. 608. Procedure for waiver or delay of completion.
"Sec. 609. Procedures for gathering comments.
"Sec. 610. Periodic review of rules.
"Sec. 611. Judicial review.
"Sec. 612. Reports and intervention rights.

"§ 601. Definitions

5 USC 601.

"For purposes of this chapter—

"(1) the term 'agency' means an agency as defined in section 551(1) of this title; 5 USC 551.

"(2) the term 'rule' means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term 'rule' does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances; 5 USC 553.

"(3) the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register; 15 USC 632.

"(4) the term 'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

"(5) the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register; and

"(6) the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction' defined in paragraphs (3), (4) and (5) of this section.

5 USC 602.

"§ 602. Regulatory agenda

Publication in Federal Register.

"(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

"(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

"(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and

"(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

Transmittal to SBA.

"(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

Notice.

"(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

"(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

5 USC 603.

"§ 603. Initial regulatory flexibility analysis

Public comment. 5 USC 553.

"(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities.

Publication in Federal Register. Transmittal to SBA.

The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.

"(b) Each initial regulatory flexibility analysis required under this section shall contain—

"(1) a description of the reasons why action by the agency is being considered;

"(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

"(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

"(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

"(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

"(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

"(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

"(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

"(3) the use of performance rather than design standards; and

"(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

"§ 604. Final regulatory flexibility analysis 5 USC 604.

"(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain— 5 USC 553.

"(1) a succinct statement of the need for, and the objectives of, the rule;

"(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

"(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

"(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register at the time of publication of the final rule under section 553 of this title a statement describing how the public may obtain such copies. Public availability; publication in Federal Register. 5 USC 553.

"§ 605. Avoidance of duplicative or unnecessary analyses 5 USC 605.

"(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

"(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

Certification, publication in Federal Register and transmittal to SBA.

"(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

5 USC 606.

"§ 606. Effect on other law

"The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

5 USC 607.

"§ 607. Preparation of analyses

"In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

5 USC 608.

"§ 608. Procedure for waiver or delay of completion

Publication in Federal Register.

"(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

Publication in Federal Register.

"(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

5 USC 609.

"§ 609. Procedures for gathering comments

"When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through techniques such as—

"(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

"(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

"(3) the direct notification of interested small entities;

"(4) the conduct of open conferences or public hearings concerning the rule for small entities; and

"(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

"§ 610. Periodic review of rules

5 USC 610.

"(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

Plan, publication in Federal Register.

"(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

Consideration factors.

"(1) the continued need for the rule;

"(2) the nature of complaints or comments received concerning the rule from the public;

"(3) the complexity of the rule;

"(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

"(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

"(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

Publication in Federal Register.

"§ 611. Judicial review

5 USC 611.

"(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provi-

sions of this chapter to any action of the agency shall not be subject to judicial review.

"(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

"(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

Submittal to President and congressional committees. 5 USC 612.

"§ 612. Reports and intervention rights

"(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

"(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities.

"(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).".

EFFECTIVE DATE

5 USC 601 note.

SEC. 4. The provisions of this Act shall take effect January 1, 1981, except that the requirements of sections 603 and 604 of title 5, United States Code (as added by section 3 of this Act) shall apply only to rules for which a notice of proposed rulemaking is issued on or after January 1, 1981.

Approved September 19, 1980.

LEGISLATIVE HISTORY:

SENATE REPORT No. 96-878 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 126 (1980):
Aug. 6, considered and passed Senate.
Sept. 8, 9, considered and passed House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 16, No. 38:
Sept. 19, Presidential statement.

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

Historical Note

Popular Name. The provisions of this subchapter and chapter 7 of this title were originally enacted by Act June 11, 1946, c. 324, 60 Stat. 237, popularly known as the "Administrative Procedure Act". That Act was repealed as part of the general revision of this title by Pub.L. 89-554 and its provisions incorporated into this subchapter and chapter 7 hereof.

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94–409, § 4(b), Sept. 13, 1976, 90 Stat. 1247.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
(1)	5 U.S.C. 1001(a)	June 11, 1946, ch. 324, § 2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, § 302, 60 Stat. 918. Aug. 10, 1946, ch. 951, § 601, 60 Stat. 993. Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37. June 30, 1947, ch. 163, § 210, 61 Stat. 201. Mar. 30, 1948, ch. 161, § 301, 62 Stat. 99.
(2)–(13)	5 U.S.C. 1001 (less (a))	June 11, 1946, ch. 324, § 2 (less (a)), 60 Stat. 237.

Explanatory Notes

In paragraph (1), the sentence "Nothing in this Act shall be construed to repeal delegations of authority as provided by law." is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words "or naval" are omitted as included in "military".

In paragraph (1)(H), the words "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947" are omitted as executed. Reference to the "Selective Training and Service Act of 1940" is omitted as that Act expired Mar. 31, 1947. Reference to the "Sugar Control Extension Act of 1947" is omitted as that Act expired on Mar. 31, 1948. References to the "Housing and Rent Act of 1947, as amended" and the "Veterans' Emergency Housing Act of 1946" have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub.L. 87-256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub.L. 87-256.

In paragraph (2), the words "of any character" are omitted as surplusage.

In paragraph (3), the words "and a person or agency admitted by an agency as a party for limited purposes" are substituted for "but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes".

In paragraph (9), a comma is supplied between the words "limitation" and "amendment" to correct an editorial error of omission.

In paragraph (10)(C), the words "of any form" are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1976 Amendment. Par. (14). Pub.L. 94–409 added par. (14).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94–409 effective 180 days after Sept. 13, 1976, see section 6 of Pub.L. 94–409, set out as a note under section 552b of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–409, see 1976 U.S.Code Cong. and Adm.News, p. 2183.

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§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1003	June 11, 1946, ch. 324, § 4, 60 Stat. 238.

Explanatory Notes

In subsection (a)(1), the words "or naval" are omitted as included in "military".

In subsection (b), the word "when" is substituted for "in any situation in which".

In subsection (c), the words "for oral presentation" are substituted for "to present the same orally in any manner". The words "sections 556 and 557 of this title apply instead of this subsection" are substituted for "the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection".

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Cross References

Commissioner of Education, prescribing of rules as to priorities in connection with grants for construction of undergraduate academic facilities by, see section 1132a-5 of Title 20, Education.

Federal Register Act, see section 1502 et seq. of Title 44, Public Printing and Documents.

Sugar Act, procedure of Secretary of Agriculture in making determinations of substantial interference under, see section 1116 of Title 7, Agriculture.

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§ 632. Definition of small-business concern

For the purposes of this chapter, a small-business concern shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. In addition to the foregoing criteria the Administrator, in making a detailed definition, may use these criteria, among others: Number of employees and dollar volume of business. Where the number of employees is used as one of the criteria in making such definition for any of the purposes of this chapter, the maximum number of employees which a small-business concern may have under the definition shall vary from industry to industry to the extent necessary to reflect different characteristics of such industries and to take proper account of other relevant factors.

Pub.L. 85–536, § 2[3], July 18, 1958, 72 Stat. 384.

Historical Note

Codification. Prior similar provisions were contained in section 203 of Act July 30, 1953, c. 282, Title II, 67 Stat. 233, which was previously classified to this section. See Codification note under section 631 of this title.

Legislative History. For legislative history and purpose of Pub.L. 85–536, see 1958 U.S.Code Cong. and Adm.News, p. 3071.

SMALL BUSINESS AND FEDERAL PROCUREMENT COMPETITION ENHANCEMENT ACT OF 1984

"(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

"(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

"(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.".

(b) Section 2320(a) of title 10, United States Code, is amended by striking out "in regulations prescribed as part" and inserting in lieu thereof "in regulations of the Department of Defense prescribed as part".

Effective date. 41 USC 418a note.

(c) The amendment made by subsection (a) shall take effect on the date of enactment of this Act. The regulations required by such amendment shall be issued not later than July 1, 1985.

Report.

(d) Within 60 days after the date the regulations required by the amendment made by subsection (a) are prescribed, the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration shall submit to Congress a joint report describing in detail how those regulations give consideration to the factors specified for consideration in that section.

PUBLICATION OF PROPOSED REGULATIONS

SEC. 302. (a) The Act is further amended by inserting after section 21 (as added by section 301 of this Act) the following new section:

"PUBLICATION OF PROPOSED REGULATIONS

Federal Register, publication. 41 USC 418b.

"SEC. 22. (a) Except as provided in subsection (d), no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 30 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register pursuant to subsection (b).

"(b) Subject to subsection (c), the head of the agency shall cause to be published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on such proposal. The length of such comment period may not be less than 30 days.

"(c) Any notice of a proposed procurement policy, regulation, procedure, or form prepared for publication in the Federal Register shall include—

"(1) the text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and a statement specifying the name, address, and telephone number

of the officer or employee of the executive agency from whom the full text may be obtained; and

"(2) a request for interested parties to submit comments on the proposal and shall include the name and address of the officer or employee of the Government designated to receive such comments.

"(d)(1) The requirements of subsections (a) and (b) may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with such requirements impracticable.

"(2) A procurement policy, regulation, procedure, or form with respect to which the requirements of subsections (a) and (b) are waived under paragraph (1) shall be effective on a temporary basis if—

"(A) a notice of such procurement policy, regulation, procedure, or form is published in the Federal Register and includes a statement that the procurement policy, regulation, procedure, or form is temporary; and

"(B) provision is made for a public comment period of 30 days beginning on the date on which the notice is published.

After considering the comments received, the head of the agency waiving the requirements of subsections (a) and (b) under paragraph (1) may issue the final procurement policy, regulation, procedure, or form.".

(b) The procedures required by the amendment made by subsection (a) shall apply with respect to procurement policies, regulations, procedures, or forms that an agency issues in final form on or after the date which is 30 days after the date of enactment of this Act.

Effective date. 41 USC 418b note.

(c)(1) Section 2303a of title 10, United States Code, is repealed.

Ante, p. 2590.

(2) The table of sections of chapter 137 of such title is amended by striking out the item pertaining to section 2303a.

PROCUREMENT NOTICES

SEC. 303. (a) Section 18 of the Office of Federal Procurement Policy Act is amended to read as follows:

"PROCUREMENT NOTICE

"SEC. 18. (a)(1) Except as provided in subsection (c)—

41 USC 416. Public information.

"(A) an executive agency intending to—

"(i) solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000; or

"(ii) place an order, expected to exceed $10,000, under a basic agreement, basic ordering agreement, or similar arrangement,

shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services for a price exceeding $25,000, or placing an order referred to in clause (A)(ii) exceeding $25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

[From the Congressional Record, Aug. 6, 1980]

S. 299, "The Regulatory Flexibility Act": Section-by-Section Analysis

Section 2. Findings and Purposes.

Section 3. Amends title 5, United States Code by inserting a new chapter 6, subchapter 1. (The following section numbers refer to the new sections created by the bill.)

Section 601. Definitions:

Section 601 defines the six terms which have particular significance in this subchapter. These are "agency", "rule", "small business", "small organization", "small governmental jurisdiction" and "small entity".

Section 601(1) defines an agency by reference to the definition in Section 511(1) of title 5 of the United States Code. Both executive and independent agencies are included in this definition.

Section 601(2) defines "rule" to be any rule for which an agency must publish a general notice of proposed rulemaking pursuant to Section 553(b) of title 5 of the United States Code or any other law. Additionally, rules of general applicability pertaining to federal grants to state and local governments for which the agency provides an opportunity for notice and comment are included under the definition. The definition of rule excludes rules of particular applicability relating to, *inter alia*, rates, wages, corporate or financial structures or prices.

Section 601(3) defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act (15 U.S.C. § 631 *et seq.*). The Small Business Act has essentially a three-part definition of small business concern: (a) one that is independently owned and operated; (b) which is not dominant in its field; and (c) which falls within the size standards regarding sales and/or employment established by the Small Business Administration by rule.

In so defining small business for purposes of this Act, it is not intended that the Small Business Act definition be established as an absolute standard. The Small Business Administration, for purposes of various loan, procurement and other Congressionally mandated programs, establishes standards to determine eligibility for various Small Business Administration programs. It is the most convenient and appropriate reference point for the analyses required under this Act.

However, there will be instances in which it may be more appropriate for an agency to issue different regulations for various sizes of businesses. The Act encourages an agency to vary the definition of a small business where appropriate as long as certain procedural requirements are fulfilled. This is to encourage agencies to adopt their definitions of small business so that they complement the subject of the agency's regulatory responsibility.

It is the intent of the bill that agencies should first try to adopt the Small Business Act definition appropriate to their needs. There are two reasons for this approach. First, the Small Business Administration presently possesses most of the information and expertise in the federal government concerning business size. Second, having agencies adopt the Small Business Act definition when possible, could avoid conflicts from the use of varying definitions by different agencies.

If an agency can establish that the Small Business Act definition is inappropriate to one or more of the agency's activities, however, it may adopt an alternative definition provided that: (a) the Office of Advocacy of the Small Business Administration is consulted; and (b) the new definition is adopted after giving the public an opportunity to comment on the proposed new definition. This provision does not require agencies to promulgate a new rule under 5 U.S.C. § 553 to establish its definition or definitions of small business (or of the other definitions in this subchapter). However, when considering changes in agency guidelines for this purpose, agencies must notify the public and provide opportunity for comments on the definition.

One definition of small business may not be appropriate when applied uniformly to all rules of an agency. Therefore, the bill gives agencies the flexibility to adopt special definitions of small business for application to a particular rule or category of rules. This should be done only when necessary to enable the agency to better comply with the intent of the bill and to apply the concept of flexible regulations to *more* regulations. Caution should be used to avoid the confusion resulting from too many different definitions of small business within an agency. In addition, this flexibility should not be interpreted to require agencies to adopt separate definitions of small business for each regulation.

Finally, it is clearly not the intention of the bill to alter the definitions of the Small Business Act, or the Small Business Investment Act of 1958, or in rules, such as those affecting the federal government, which have been promulgated by the Small Business Administration pursuant to those acts. Nor should an agency use its

own definition of small business permitted under this section to supersede or alter the definitions contained in those acts. An agency may not, for example, redefine "small business" to relieve the agency of the obligation of complying with any rule of the Small Business Administration under which the agency may be required to act.

Section 601(4) defines "small organization" as a not-for-profit enterprise which is independently owned and operated and not dominant in its field. As with the definition of a small business, an agency may adopt another definition or definitions of "small organization" appropriate to its activities after opportunity for public comment. The intent of this provision is to cover other small concerns that may fall outside the definition of small business and to assure that the application of the term "small organization" is guided by the same considerations which were used in developing the definition of a small business.

The phrase "not dominant in its field" should be interpreted liberally with respect to non-profit public service organizations. While some such organizations, for example, YMCA's/YWCA's or Boy Scouts/Girl Scouts, may have activities nationwide, decisions on whether to treat them as small organizations should depend on an analysis of several factors. For example, the agency should examine the structure and operating characteristics of the organization at the local as well as the national level, and should consider the organizational resources and ability to comply with rules and reporting requirements at both the local and national levels.

It is not the intent of the bill that nationwide not-for-profit public service organizations be excluded from being defined as small organizations merely by virtue of their nationwide status. If for-profit and not-for-profit enterprises offer similar goods or services, agencies should consider the same factors for both types of enterprises in determining which are small.

Section 601(5) defines the term "small governmental jurisdiction" to include cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000 unless an agency establishes another definition or definitions appropriate to its activities after opportunity for public comment. Definitions established by an agency need not adhere strictly to the 50,000 population standards nor are they restricted to the types of requirements the agency may impose under a rule affecting governmental jurisdictions. Also relevant are factors such as location in a rural or relatively sparsely populated area even if the total population of the government unit exceeds 50,000 in that particular governmental jurisdiction.

Section 601(6) defines the term "small entity" as having the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" which are defined in the preceding three paragraphs. The term "small entity" is used to refer to all of the other three terms taken together and, by permitting the substitution of one term for three terms, simplifies the language of the bill.

Section 602. Regulatory Flexibility Agendas:

Section 602(a) requires agencies to publish in the Federal Register in October and April of each year a regulatory flexibility agenda. Section 602(a)(1) provides that this agenda shall contain a brief description of the subject area of any rules which the agency expects to propose or promulgate during the succeeding twelve months which are likely to have a significant economic impact on a substantial number of small entities.

The bill also requires a description of rules which are likely to have a "significant economic impact on a substantial number of small entities." Agencies should not give a narrow reading to what constitutes a "significant economic impact" for purposes of this section or other sections in which the term is used. The effect need not be significant on every business subject to the regulation for the total effect of a rule to be significant and thus be required to be published in the agenda and subject to the required analyses.

Likewise, a determination of significant economic effect is not limited to easily quantifiable costs. For example, a reporting form which requires extensive bookkeeping translations from a customary system to one which would produce an answer in a format required by the agency certainly could have a significant impact on a substantial number of small businesses. An agency cannot avoid the requirements of this bill by suggesting that such a form does not have an "economic" effect.

The term "substantial number" of small entities is intended to mean substantial numbers of entities within one of the listed categories or groups which are the focus of this legislation--that is, small businesses, small organizations and small governmental jurisdictions. In order to meet this test, agencies are not required to find that an overwhelming percentage of small businesses, small organizations and small governmental jurisdictions would be affected. One particular rule may well affect a

substantial number of school districts, for example, but have no impact on small businesses or organizations. Such a rule would be considered to have satisfied this portion of the test in such an instance.

Section 602(a)(2) further requires the agency to summarize the rule or area of regulation under consideration for each subject appearing on the agenda along with the objectives and legal basis for the rule. In addition, this paragraph requires the agenda to include an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking.

The purpose of this section is to give advance notice of pending agency rulemaking activity to better enable small entities to participate in the development of the rule, if any. The agenda would not, however, require agencies to announce enforcement proceedings which they are contemplating or planning.

Section 602(a)(3) provides that the agency must list the name and telephone number of an agency official who can answer questions about the subject area or rule contained in the agenda. This is to facilitate prompt assistance in understanding the agenda item for any interested member of the public.

Section 602(b) provides that copies of each regulatory flexibility agenda shall be forwarded to the Chief Counsel for Advocacy of the Small Business Administration to facilitate the receipt of any comments.

Section 602(c) directs agencies to take additional steps to enable small entities and their representatives to find out about agency regulatory flexibility agendas. Agencies must use methods such as direct notification or publication of the agenda in publications likely to reach such businesses, organizations, and governmental jurisdictions. Comments and suggestions from these groups are to be invited on all agenda items.

Section 602(d) makes clear that the anouncement of regulatory activities contained in the regulatory flexibility agenda is solely for the purpose of providing information to affected small entities, the Congress, and to the public. Thus, in those instances in which an agency must consider or act upon a rule that did not appear on the agenda, it may do so. Similarly, an agency will not be required to consider or act on any matter solely because it appeared in an agenda.

Section 603. Initial Regulatory Flexibility Analysis:

Section 603(a) states that when an agency is required by Section 553 of title 5, United States Code, or any other law, to publish a general notice of proposed rulemaking, the agency must also prepare an initial regulatory flexibility analysis of that proposed rule. This analysis will be a preliminary agency assessment of the impact of the proposed rule on small businesses, small organizations and small governmental jurisdictions. The initial analysis in a summary will be published in the Federal Register at the time the general notice of proposed rulemaking is published. A copy of the initial analysis will also be sent to the Chief Counsel for Advocacy of the Small Business Administration for comments, if any.

Section 603(b) contains a list of five items which must appear in the initial regulatory flexibility analysis. In Sections 603(b) (1) and (2), the analysis is required to describe why action by the agency is being considered and state the objectives of, and the legal basis for, the proposed rule. One of the reasons for these requirements is to force agencies to recognize that the best agency course may be not to act, despite the existence of authority to issue a rule.

Section 603(b)(3) mandates that initial analyses provide a description of, and, if feasible, an estimate of the number of small businesses, small organizations, and small governmental jurisdictions to which the rule will apply.

Section 603(b)(4) requires an estimate of the projected reporting, recordkeeping or other paperwork requirements of the proposed rules, a description of the types of small entities subject to these requirements, and an estimate of the skill required to comply with them. At the time the rule is proposed, these estimates will be just that—estimates or projects—and will not be as precise as estimates could be expected to be when the final rule is published. However, by requiring agencies to make these early projections, there will be an opportunity to consider the often overlooked burden created by rules, especially upon small entities. It is also designed to enable affected small entities to more easily suggest ways to minimize the unnecessary effects of a rule.

Section 603(b)(5) requires agencies to attempt to identify, to the extent feasible, relevant federal rules which may duplicate, overlap or conflict with the proposed rule.

Section 603(c) provides that an initial regulatory flexibility analysis shall contain a description of any significant alternatives to the proposed rule which would accomplish the stated objectives of applicable statutes and which may minimize any significant economic effect of the proposed rule on small entities.

Alternative approaches listed in this section include: (1) varying compliance and reporting requirements and timetables which schedule compliance deadlines to take into account the limited resources of small entities; (2) clarifying, consolidating or simplifying the compliance and reporting requirements of the proposed rule for small entities; (3) adopting performance rather than design standards to provide greater flexibility for entities with limited resources; and (4) providing exemptions for small entities from all or part of the proposed rule or its paperwork requirement.

Agencies are not limited to the alternatives listed in this subsection when they search for means to accomplish their statutory mandates while reducing the impact of a rule on small entities. In fact, it is expected that agencies will seek and discover other innovative techniques of tailoring regulations to small entities consistent with the stated objectives of the underlying statute authorizing the rule.

It is important to note that the bill does not require agencies to adopt all or any of the listed flexible alternatives in this section. Agencies must consider only those alternatives which are "consistent with the stated objectives of applicable statutes". If an alternative does not allow the agency to effectively enforce its existing statutes, that alternative would not meet this test with regard to the underlying statute authorizing the rule and the agency would not be required to adopt that alternative.

It is evident that not all of the listed alternatives are appropriate in each agency context, particularly with regard to laws protecting health, safety or the rights of specific groups. For example, a worker in a machine shop with fifteen employees must not be forced to operate dangerous machinery with less than the basic safety protections accorded an operator of similar equipment in a much larger factory.

Nor would this bill, as it applies to environmental or health and safety laws, require or authorize an agency to allow a small chemical company to discharge a hazardous chemical such as kepone into nearby rivers while, because of the inherent danger involved, forbidding such action by a large firm.

The objective of regulatory flexibility is not to create a double standard of protection for beneficiaries of health, safety or environmental laws based on the size of the entity involved. The purpose is to require agencies to consider the wide range of diversity among regulated entities and try to tailor their regulatory requirements to the different circumstances which they face.

As stated with regard to section 602(a), the term "significant economic impact" should not be interpreted to mean that agencies may ignore effects of the rule which are burdensome and non-trivial but not susceptible to precise quantification in economic terms. For example, the nature, complexity and frequency of reporting and recordkeeping requirements are to be analyzed in each rulemaking whether or not these burdens have been strictly quantified. The discussion of the term "substantial number" in relation to subsection 602(a) also applies to this subsection.

Section 604. Final Regulatory Flexibility Analysis:

Section 604(a) requires an agency to prepare a final regulatory flexibility analysis when it publishes a final rule which was subject to a legal requirement to publish a general notice of proposed rulemaking. Even if an agency was not required to publish an initial regulatory flexibility analysis, it may later determine, on the basis of comments received or other reasons, that the rule would have a significant economic impact on a substantial number of small entities. If so, the agency must publish a final regulatory flexibility analysis. The analysis must contain a statement of the need for and objectives of the rule; a summary of the significant issues raised by the public and of the agency assessment of those issues; and an explanation of any changes made in the rule in response to public comments.

Section 604(a)(3) requires the agency to describe in the final regulatory flexibility analysis each of the significant alternatives to the rule designed to minimize any significant economic impact on small entities which the agency considered. For each such alternative which the agency rejected, it must state its reasons. This is an important provision designed to assure that agencies engage in principled decisionmaking.

The agency does not have to find that every alternative to the rule which it rejects is by definition one which would minimize the significant impact of the rule upon small entities. Some alternatives suggested by the public or agency staff with the purpose of minimizing the impact of the rule on small entities may not, after careful analysis, achieve that end. If so, a statement to that effect would satisfy the requirement of this section.

As in the case of section 603, this provision does not require that an agency adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires that an agency, having identified and analyzed significant alternative proposals, describe those it considered and explain its

rejection of any which, if adopted, would have been substantially less burdensome on the specified entities. Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative. The purpose of this provision is to require agencies to explain the rationale for their actions to assure that significant alternatives identified by the agency or proposed by the public were, in fact, given serious consideration.

Section 604(b) provides that copies of the final regulatory flexibility analysis will be available to members of the public. Agencies are directed to publish a statement in the Federal Register explaining how copies may be obtained.

Section 605. Avoidance of Duplicative or Unnecessary Analyses:

Section 605(a) has two purposes—it is designed to help reduce paperwork and delay by authorizing agencies to consider a series of closely related rules or alternatives as one rule or alternative in complying with the requirement of Sections 603 and 604 to prepare initial and final regulatory flexibility analyses. And it directs agencies that they are not to avoid the requirements of this Act by dividing a larger rule into smaller units with less impact. In addition, agencies may incorporate in a regulatory flexibility analysis any data or analysis contained in any other impact statement or analysis required by law.

Section 605(b) permits agency heads to certify that a proposed or final rule will not have a significant economic effect on a substantial number of small entities. If so, the agency must publish the certification in the Federal Register in addition to a brief statement of the reasons for the decision. Following this certification, the agency is not required to prepare an initial or final regulatory flexibility analysis on that rule.

It is possible for this determination to be made at several points in the rulemaking process. If it comes prior to the publication of a general notice for proposed rulemaking, the agency must publish a statement explaining its decision at the time the general notice is published. If this determination is made after the general notice of proposed rulemaking but prior to publication of the final rule, the agency must publish and explain its decision when it is made or at least at the time of publication of the final rule.

The term "significant economic impact" is, of necessity, not an exact standard. Because of the diversity of both the community of small entities and of rules themselves, any more precise definition is virtually impossible and may be counterproductive. Any more specific definition would require preliminary work to determine whether the regulatory analysis must be prepared. But the same is true if the definition is a general one like "significant economic impact". Thus, there would seem to be little to gain and perhaps some to lose in terms of equity and flexibility by trying to predetermine what is a significant economic impact through definitional language.

Agencies may find that the Small Business Administration guidelines for measuring the impact of rules on small businesses could be of assistance to other agencies in making these determinations.[1]

The term "substantial number" of small entities is intended to mean substantial numbers of entities within one of the listed categories of groups which are the focus of this bill—that is, small businesses, small organizations and small governmental jurisdictions. In order to meet this test, agencies are not required to find that an overwhelming percentage of small businesses, small organizations or small governmental jurisdictions would be affected. A particular rule may well affect a substantial number of school districts, for example, but have no effect on small businesses or organizations. Such a rule should be considered to have satisfied this portion of the test in such an instance.

Section 605(c) permits an agency to consider a series of closely related rules as one rule for purposes of Sections 602 (agenda), 603 (initial regulatory flexibility analysis), 604 (final regulatory flexibility analysis) and 610 (periodic review of rules) to avoid duplicative action.

Section 606. Effect on Other Law:

Section 606 makes it clear that the requirements for the preparation of the initial and final regulatory flexibility analyses in Sections 603 and 604 do not change the substantive or procedural standards otherwise applicable by law to agency action. Thus, if a statute directs an agency to issue rules to "protect the public health", the requirements in Sections 603 and 604 do not alter that mandate, but merely require

[1] See Regulatory Reform Hearings, Part 3, at 98–99.

the agency to consider alternative methods for implementing the mandate which minimize unnecessary burdens on small entities.

Agencies are required to consider only those alternatives to the proposed rule which are consistent with the stated objectives of the statute authorizing the issuance of the rule.

Section 607. Preparation of Analyses:

Section 607 informs agencies which are required to analyze alternatives to minimize the significant economic impact of rules on small entities in Sections 603 and 604 that such analyses need not be limited to a quantification or numerical estimation of the effects of the rules. Instead, agencies are encouraged to make reasoned estimates or quantifiable and nonquantifiable effects of various proposals, basing such estimates upon experience and expertise of agency personnel and any other information made available to the agency by external sources. If such a reasoned estimate is not practicable, the agency should state generally a description of the nature and extent of nonquantifiable effects of the rules.

Section 608. Procedures for Waiver or Delay of Completion:

Section 608(a) allows the head of an agency to waive or delay completion of an initial regulatory flexibility pursuant to section 603 by publishing a statement in the Federal Register that the agency's action is in response to an emergency which makes compliance or timely compliance impracticable. Such publication should be made not later than the date of publication of the final rule and should include reasons for the waiver or delay. This section shall not apply if an agency issues a rule pursuant to sections 553(b)(3)(B) or 553(d)(3) of title 5, United States Code.

Section 608(b), however, precludes waiver of the final regulatory flexibility analysis required to be promulgated in Section 604. Thus, a final regulatory flexibility analysis must be performed and published for every rule, including those developed in response to an emergency.

The completion of the requirement for a final analysis may be delayed (for not more than ninety days after the date of publication of the final rule) by the agency head only upon certification that such delay is due to an emergency which makes timely compliance impracticable. The certification should be made through publication in the Federal Register and should include reasons for the delay. If the final regulatory analysis is not published within the alloted 180 days, the rule lapses and may not be reissued until a final regulatory flexibility analysis has been completed by the agency.

Section 609. Procedures for Gathering Comments:

Section 609 requires the head of any federal agency which is preparing to adopt a rule which would have a significant economic impact on a substantial number of small entities to assure that these groups have adequate opportunities to comment upon the rule prior to its adoption. Suggested methods include the following: (a) direct notification of interested small businesses, organizations and governmental jurisdictions; (b) placing notice of the proposed rule in publications likely to be obtained by such small entities; (c) the conduct of open conferences or public hearings; and (d) the adoption or modification or procedural rules to reduce the complexity or cost of participation in the rulemaking by small entities. The bill grants to agencies the discretion to choose among these and other methods of outreach.

The purpose of this section is to encourage agency heads to establish procedures to guarantee increased participation in rulemaking by small entities. The procedures mentioned herein are intended to be used as a part of the normal rulemaking process as required by chapters 5 and 6 of title 5, United States Code, and are not designed to establish inconsistent or separate procedures.

Section 610. Periodic Review of Rules:

Section 610(a) provides that within one hundred and eighty days after the effective date of this subchapter, each agency will publish a plan for the periodic review of its rules which have or will have a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether the rule should be rescinded or amended, consistent with the stated objectives of applicable statutes, to minimize the unnecessary impacts of the rule on such small entities. The plan must provide for the review of all such rules existing on the effective date of this subchaper within ten years (which may be extended yearly up to five additional years). In addition, it must provide for the periodic review (at least every ten years) of rules having a significant economic impact on small businesses, organizations and governments which are issued after the effective date of this subchapter.

Section 610(b) lists several factors to be considered during the period review of rules to determine whether the rule should be amended or rescinded to minimize the impact on small entities: the continued need for the rule; the nature of com-

plaints about the rule's operation; the complexity of the rule; the extent to which it overlaps, duplicates or conflicts with other federal rules; and, if possible, with state and local rules; and the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. These additional factors are contained in Executive Order 12044 (43 Fed. Reg. 12,661 (1978): Improving Government Regulations), issued by President Carter on March 23, 1978. Thus, agencies which are currently complying with that order will not be unduly burdened by applying these same criteria to the periodic review of agency rules which significantly impact small businesses, organizations and governmental jurisdictions.

Section 611. Judicial Review:

Section 611(a) provides that there is no judicial review of any determination by an agency regarding the applicability of any provision of this subchapter except as provided in Section 611(b). This means, for example, that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to Section 605(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency. Also not subject to judicial review are agency determinations regarding the agenda (section 602), the procedures for gathering comments (section 609), the periodic review of rules (section 610) and any other administrative determinations under this act.

Section 611(b) provides that a regulatory flexibility analysis is a management tool and administrative procedure to effect improved rulemaking. Neither the manner of conducting regulatory flexibility analyses nor the content of the analyses should be subject to judicial review, either pursuant to this act or pursuant to Section 706(2)(D) of title 5, United States Code, or pursuant to any other provision of law. But once a regulatory analysis has been prepared, its contents may, if relevant, be considered by the reviewing court along with other relevant material in determining the validity of the rule which is the subject of the analysis.

The court will look to the statement of the basis and purpose published by the agency along with its final rule to determine whether the rule is valid. In making that determination, the court may consider the contents of the regulatory flexibility analysis along with any other relevant material.

Section 611(c) provides that if another impact statement or analysis is required by a different statute, this section does not affect existing requirements regarding judicial review of that statement or analysis.

Section 612. Reports and Intervention Rights:

Section 612(a) requires the Chief Counsel for Advocacy of the Small Business Administration to monitor agency compliance with this chapter. This Office must report at least annually to the Committees on the Judiciary of the Senate and House of Representatives and the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

Section 612(b) authorizes the Chief Counsel for Advocacy of the Small Business Administration to appear as amicus curiae in any action brought in court to review the legal validity of a rule. The Chief Counsel may present his views regarding the effect of the rule on small businesses, small organizations or small governmental jurisdictions. The Chief Counsel currently has the right to appear in federal agency proceedings on behalf of small business. This section extends that right to include appearance in federal court proceedings also.

Section 612(c) provides that a court of the United States shall grant the Chief Counsel for Advocacy permission to appear in a court action regarding a rule for the purposes described in Section 612(b).

Section 4 of the bill provides that the effective date of this act is January 1, 1981, except that the provisions regarding regulatory flexibility analyses will apply only to rules for which a notice of proposed rulemaking is issued on or after that date.

Regulatory Impact Statement for S. 299 as Reported by the Judiciary Committee

Pursuant to paragraph 11(b) of rule 26 of the Standing Rules of the Senate, the Committee estimates that the bill will have a regulatory impact as described in the preceding report. Because the purpose of the bill is to reform federal rulemaking procedure, it is necessary to refer to the body of the Committee Report accompanying the bill to adequately describe the regulatory impact of the bill.

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